IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

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Criminal No. 10743

UNITED STATES OF AMERICA

*v.*

WILLIAM B. BERMAN AND THEODORE E. BERMAN

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## STATEMENT AS TO JURISDICTION

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In compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court dismissing the indictment.

### OPINION BELOW

The opinion of the District Court dismissing the indictment has not been reported. A copy thereof is attached hereto as an appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered March 19, 1953. The jurisdiction of the Supreme Court to review on direct appeal the decision of the District Court sustaining, prior to the attachment of jeopardy, the defendant's plea in bar is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P. The following decisions sustain the jurisdiction of the Supreme Court. *United States* v. *Goldman,* 277 U.S. 299, 236-237; *United States* v. *Oppenheimer,* 242 U.S. 85.

QUESTION PRESENTED

Whether the offense of embezzling money of the United States is an offense involving fraud within the purview of the Wartime Suspension of Limitations Act.

STATUTES INVOLVED

Section 47 of the Criminal Code, 18 U.S.C. (1946 ed.) 100, which was in effect at the time of the offenses involved in the indictment, provided:

> Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years or both. (Mar. 4, 1909, ch. 321, & 47, 35 Stat. 1097.)

Section 1 of the Act of August 24, 1942, c. 555, 56 Stat. 747, as amended by Section 19(b) of the

Act of July 1, 1944, 56 Stat. 667, and by Section 28 of the Surplus Property Act of 1944, 56 Stat. 781 (18 U.S.C. (1946 ed.) 590a), now revised as permanent legislation (18 U.S.C. (1948 rev.) 3287), commonly known as the Wartime Suspension of Limitations Act, provided in pertinent part at the time when the offenses involved herein were alleged to have been committed:

> The running of any existing statute applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in World War II as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *

18 U.S.C. (1948 rev.) 3287, which became effective on September 1, 1948, and was in effect on May 20, 1952, the date of the return of the indictment herein, provides in pertinent part:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the Presi-

dent or by a concurrent resolution of Congress.[1]

STATEMENT

On May 20, 1952, a two-count indictment was returned against defendants in the United States District Court for the Northern District of California. The first count charged that on or about July 31, 1946, defendants knowingly and fraudulently embezzled money of the United States in that they deposited to their account $1,156.09 belonging to the Commodity Credit Corporation, a corporation owned by the United States, which they had received as agents for the C.C.C. in the sale of wool belonging to the C.C.C. The second count charged conspiracy to embezzle money of the United States by diverting to private bank accounts money received from the sale of wool owned by the C.C.C., and set forth ten overt acts on dates ranging from July 31, 1946 to January 9, 1948.

Defendants moved to dismiss the indictment on the ground, *inter alia*, that it was barred by the statute of limitations. The District Court granted the motion, holding that the Suspension of Limitations statute did not apply to toll the running of the otherwise applicable three-year period of limitations because the statute defining the offense on which the indictment was based did not expressly "denominate" fraud as an element of the offense.

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[1] The President proclaimed the termination of hostilities on December 31, 1946. 12 F.R. 1.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court that the crime of embezzlement of money of the United States is not a crime involving fraud against the United States within the meaning of the Wartime Suspension of Limitation Act represents the *reductio ad absurdum* of the theory that the Suspension Act applies only to statutes expressly denominating fraud as an element of the offense.

Embezzlement, by definition, means the "Fraudulent appropriation of property by a person to whom it has been entrusted." Webster's *New International Dictionary* (2nd ed.). See *Moore* v. *United States*, 160 U.S. 268, 269. Fraudulent intent is so inherent in the mere use of the word that, at a time when indictments were strictly construed, the Supreme Court held as to a state indictment: "As the word 'embezzled' itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word 'fraudulent' would not enlarge or restrict its signification." *Grin* v. *Shine*, 187 U.S. 181, 189. See *Morissette* v. *United States*, 342 U.S. 246.

Thus, even more clearly than the crime of making a false claim against the United States (the crime involved in *United States* v. *Grainger, et al.*, Nos. 634-636, presently on appeal from a decision of the same judge who decided the instant case), the crime of embezzlement is a crime involving fraud within the purview of the Suspension Act. The crime necessarily involves pecuniary loss within the construction of the word "fraud" in

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the Suspension Act laid down by the Court of Appeals for the District of Columbia Circuit in *Marzani* v. *United States,* 168 F. 2d 133, affirmed and reaffirmed by an equally divided court, 335 U.S. 895, 336 U.S. 922. It necessarily involves intent to defraud within the broadest construction of the decision of the Supreme Court in *Scharton* v. *United States,* 285 U.S. 518. Unless the Suspension Act is to be applied completely mechanically, without rationality, only to statutes which use the exact words, fraud and intent to defraud, the crime of embezzlement of money of the United States is a crime involving fraud against the United States within the meaning of that Act.[2] See *Weinhandler* v. *United States,* 20 F. 2d 359, certiorari denied, 275 U.S. 554.

It is submitted that the decision of the District Court is clearly erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

(S.) ROBERT L. STERN,
*Acting Solicitor General.*

APRIL 1953.

[2] Although not the basis of the decision below, this case does involve the issue before the Supreme Court in *United States* v. *Klinger,* No. 527, O.T. 1952, in which the Government seeks review of the judgment of the Court of Appeals for the Second Circuit, 199 F. 2d 645, holding that under the statute suspending the "running" of any statute of limitations until three years after the termination of hostilities, the period of limitations began to run, not three years, but the day after, the termination of hostilities, with the result that prosecution of all offenses within the purview of the Suspension Act was barred after December 31, 1949. Defendants moved to dismiss the indictment on such ground as well as on the ground on which the opinion of the District Court rests.

APPENDIX "A"

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

No. 10743

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

WILLIAM B. BERMAN AND THEODORE E. BERMAN, DEFENDANT

MEMORANDUM OPINION—Filed March 19, 1953

Once again this Court is confronted with the vexing question of whether the Wartime Suspension of Limitations Act can be relied upon as a defense when the statute under which the indictment is brought does not specify, in so many words, a "fraud against the United States".

1. *The Indictment.*

The indictment, filed on May 20, 1952, is in two counts.

The first count recites that on or about July 31, 1946, the defendants, in Sacramento, California, "did unlawfully, wilfully, knowingly and fraudulently embezzle certain money of the United States in the amount of $1,156.09, as follows":

During 1946 the defendants sold 8,994 pounds (gross) of Karakul wool to F. W. Krage Company, San Francisco, California, which wool was the property of the Commodity Credit Corporation, hereinafter referred to as "C.C.C." The defendant sold the wool to the Krage Company as the agents of the C.C.C. On or about July 26, 1946, in Sacramento, the defendants received from the Krage Company the sum of $1,156.09, the balance owing to the C.C.C. for the sale of the wool, which money was the property of the C.C.C.

At the same time, the defendants, well knowing that the money was the property of the C.C.C. deposited it to their private account at a Sacramento bank, and used it for their private purposes. At all these times, the United States was a stockholder of the C.C.C.

The allegations of the second count follow:

At a time and place to the grand jurors unknown, the defendants "did knowingly, wilfully, unlawfully, corruptly and feloniously conspire," etc., with each other and with divers other persons whose names are to the grand jurors unknown, "to commit offenses against the United States and the laws thereof"; namely, "to embezzle money of the United States by depositing money received by defendants" from the sale of wool owned by the C.C.C. "to their own private bank accounts and using said money for their private purposes," said money being the property of the C.C.C.

In pursuance of the purposes of the conspiracy, the defendants committed ten overt acts within the jurisdiction of this Court. All the overt acts are

alleged to have been done by the defendant William Berman, on dates ranging from July 31, 1946, to January 9, 1948, and relate to certain checks made or deposited by him, or transferred by him from the Pacific Fur and Wool Company's "Wool Account" to its "General Account".

2. *The Two Motions.*

On June 23, 1952, the defendants filed a motion to dismiss and a motion to strike from the indictment "the overt acts, items 2 to 11 (sic), inclusive, of the Second Count".

In the Court's view of the case, only the motion to dismiss need be considered. Four grounds are set forth for that motion:

> (1) The indictment does not state facts sufficient to constitute an offense against the United States.
>
> (2) It was not found within three years next after the alleged offenses were committed.
>
> (3) It was not found within three years next after December 31, 1946.
>
> (4) It was not found within three years next after September 1, 1948, effective date of repeal of "Suspension of Statutes of Limitations".

The plaintiff concedes that prosecution is barred by the three-year statute of limitations, "unless the running of this statute has been tolled by the operation of the Wartime Suspension of Limitations Act of 1942, as amended, 18 U.S.C. (1946 ed.) section 590a, or its successor, 18 U.S.C. section 3287".

3. *The Embezzlement Statute.*

Count 1 of the indictment is brought under 18 USCA section 100 (1927 edition):

> "Section 100. (Criminal Code, section 47.) *Embezzling public moneys or other property.* Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

4. *The Wartime Suspension of Limitations Act Cannot Be Relied Upon As a Defense Unless the Statute Under Which the Indictment Is Brought Specifically Punishes "Fraud Against the United States".*

This entire problem of the applicability of the Wartime Suspension of Limitations Act to crimes involving dishonesty in dealing with the Government was fully dealt with by this Court in its opinion in the cases of United States v. Grainger, No. 10744; United States v. Clavere and Kennedy, No. 10759; and United States v. Clavere, Kennedy, and Shapiro, No. 10767, handed down on December 5, 1952.

Although the indictments in those cases all related to the False Claims Statute, 18 USC section 80 (1946 ed.), the rule governing those prosecutions obtains in the instant case; namely, before the Wartime Suspension of Limitations Act can be invoked, the statute under which the indictment

is brought must *in so many words* "denominate" *fraud against the United States.*

In holding that the indictments in those three cases could not be saved by the suspension statute, this Court relied upon three Supreme Court decisions that it is believed are determinative here. They are the following:

> United States v. Scharton, 285 U.S. 518, 520-522 (1932);
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> Marzani v. United States, 335 U.S. 895 (1948), affirming, by an equally divided Court, 168 F. 2d 133, 141 (1948); reaffirmed, by an equally divided Court, 336 U.S. 922 (1949);
>
> United States v. Beacon Brass Co., 344 U.S. 43, 45, decided on November 10, 1952.

This Court, in its earlier opinion, discussed all three of these cases at some length, and cited a number of other decisions. It is therefore deemed unnecessary here to repeat that discussion. An additional observation, however, might be appropriate:

In the Scharton case, the statute under which the indictment was brought punished an attempt "to evade or defeat any tax", etc.

The Marzani and Beacon Brass statute related to "false or *fraudulent* statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States". (Emphasis supplied)

Yet in each of these cases it was held, either directly or by inescapable implication, that a statute "of repose . . . ought not to be extended by construction to embrace *so-called frauds* not so *de-*

*nominated* by the statutes creating offenses." (Emphasis supplied). 285 U.S. at page 522. If the English language contains a more definite, precise, and specific word than "denominate", this Court is not aware of it. It is derived, indeed, from another word that is reminiscent of shylockian rigidity:

> "Is it so nominated in the bond?
>
> * * * * *
>
> I cannot find it; 'tis not in the bond."[1]

Nor is the vice in the first count avoided in the second, or conspiracy, count. While it is true that the second phrase in the former conspiracy section—18 USCA 88—forbids two or more persons to conspire "to defraud the United States in any manner or for any purpose", the defendants are not charged with violating that *second* phrase. They are plainly charged, as already set forth, with violating the provision embodied in the *first* phrase of Section 88; namely, conspiring "to commit an offense against the United States".

And that offense is carefully spelled out in the indictment: "the offenses (sic) being to embezzle money of the United States," etc. Since no "fraud" is specified in the embezzlement statute, the second count, like the first, must fall of its own weight. The two types of conspiracy referred to in the statute are expressed in the disjunctive. They cannot be considered together: each stands alone.

The same indictment might well charge the commission of *both* crimes mentioned in Section 88;

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[1] *The Merchant of Venice* IV i 259, 262.

namely, (1) conspiring to commit an offense against the United States, *and* (2) conspiring to *defraud* the United States in any manner or for any purpose. The present indictment, however, does not do so. It charges only a conspiracy to *embezzle*, and not a conspiracy to *defraud*.

5. *Conclusion.*

Since the embezzlement statute under which the present indictment was brought does not contain the shibboleth "fraud against the United States", or some expression *closely* similar to it, the Court feels constrained, under the Supreme Court decisions hereinbefore noted, to hold that the Wartime Suspension of Limitations Act cannot be invoked by the plaintiff in this case. The prosecution, therefore, is barred by the three-year statute of limitations. The motion to dismiss is sustained.

The judgment is in favor of the defendants.

Dated: March 19th, 1953.

DAL M. LEMMON,
*United States District Judge.*

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No. 750. UNITED STATES *v.* BERMAN ET AL. Appeal from the United States District Court for the Northern District of California. *Per Curiam:* Judgment reversed.

*United States* v. *Grainger*, 346 U. S. 235, decided this day. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS, adopting the reasoning in the opinion of Judge Learned Hand in *United States* v. *Klinger*, 199 F. 2d 645, would affirm the District Court in dismissing this indictment. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Acting Solicitor General Stern* for the United States.